STATE OF MICHIGAN

COURT OF APPEALS

JOHN CARRUTHERS, Plaintiff-Appellant,	UNPUBLISHED May 19, 2011
v	No. 296250 Kalamazoo Circuit court
ISRINGHAUSEN, INC, Defendant-Appellee.	LC No. 2009-000127-CZ

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

In this action brought under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, and the Elliot-Larsen civil rights act (ELCRA), MCL 37.2101 *et seq.*, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS AND PROCEEDINGS

In the summer of 2006, plaintiff began working for defendant as a temporary worker, but in January 2007, plaintiff was hired by defendant as a full-time employee. At the relevant times, plaintiff worked as a material handler in the warehouse department. A material handler essentially operated a fork lift and transported material from the warehouse to the production line.

In early September 2008, defendant provided sexual harassment training for its employees. Shortly thereafter, plaintiff alleged a new female temporary worker who was assigned to the receiving department, was making inappropriate sexual comments. Plaintiff and Bill King, the warehouse supervisor, complained to the human resources manager, Barb Vroman, about the comments. On or about December 9, 2008, plaintiff and King filed complaints about the alleged sexual harassment with the Michigan Department of Civil Rights and the Equal Employment Opportunity Commission. Defendant received notice of at least one complaint to the civil rights agencies prior to defendant's layoff on January 29, 2009.

On or about December 15, 2008, the female temporary worker that plaintiff and King complained about had a forklift accident in the warehouse. After the accident, defendant discovered that she had not been properly trained and did not have a license to operate a forklift. Additionally, defendant learned the warehouse department employees had not maintained forklift

safety logs since the end of 2007. As a result of the accident and ensuing investigation, the temporary employee's assignment was terminated, another employee was terminated, King was given a three-day suspension and was demoted from warehouse supervisor to material handler, and plaintiff received a written warning. Plaintiff subsequently filed a complaint with the Michigan Occupational Safety and Health Administration (MIOSHA) based on the forklift accident.

In December 2008, defendant received a directive from its corporate parent offices to reduce the number of employees because of an economic downturn. In January 2009, the temporary employees in the warehouse were released. Additionally, a total of six other employees, including plaintiff, were laid off from their positions. Human resources informed plaintiff he was being laid off because he had the lowest seniority in the warehouse department.

Plaintiff filed this litigation, alleging defendant terminated him in retaliation for filing complaints with the MDCR, EEOC, and MIOSHA.[1] Defendant eventually moved for summary disposition pursuant to MCR 2.116(C)(10), which the trial court granted on the record, holding that plaintiff failed to establish a prima facie case of retaliation because he did not present evidence that defendant knew about the protected activity before the termination or that there was a causal connection between the protected activity and the termination. Additionally, the trial court found that even if plaintiff had established a prima facie case of retaliation, defendant articulated a legitimate, non-discriminatory reason for its employment decision, and plaintiff failed to show the reason was a pretext.

II. ANALYSIS

On appeal, plaintiff argues that he raised a genuine issue of material fact concerning (1) whether defendant had knowledge of his protected activities sufficient to make a prima facie case under both the WPA and the ELCRA at the time of the contested employment action and (2) whether there was a causal connection between the protected activities and his layoff. Further, plaintiff argues that he presented a genuine issue of material fact showing defendant's legitimate, non-discriminatory reason for the layoff was a pretext for a discriminatory animus.

We review the grant of a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id*. at 120. Parties opposing a properly supported motion for summary disposition must present more than mere conjecture and speculation. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

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[1] Plaintiff had also brought a sex harassment claim, but that claim was dropped at oral argument before the trial court.

The WPA prohibits an employer from discharging, threatening, or otherwise discriminating against an employee who reports a violation of a federal or state statute or regulation to a public body. MCL 15.362. To establish a prima face case under the WPA, "a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). If there is no evidence that the decision-maker had knowledge of the protected activity at the time of the adverse employment action, dismissal is appropriate. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257-258; 503 NW2d 728 (1993).

The relevant provision of the ELCRA, MCL 37.2701, provides:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

Similar to a WPA claim, under the ELCRA a plaintiff must show the following to establish a prima facie case of unlawful retaliation:

> (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

We note there is no dispute that plaintiff's MIOSHA and MDCR complaints constituted protected activity under the WPA and the ELCRA.

To demonstrate a causal connection under either statute, the plaintiff must demonstrate that his or her participation in a protected activity was a "significant factor" in the employer's adverse employment action; it is not enough to simply argue that a causal link existed. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). "The plaintiff ha[s] to show that his employer took adverse employment action *because of* plaintiff's protected activity." *West*, 469 Mich at 184 (emphasis in original).

A causal connection may be established through either direct or indirect, circumstantial evidence. *Shaw v Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009). Direct evidence "requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions." *Id*. For indirect evidence, a reasonable inference of causation not just speculation must be drawn from the evidence to show causation. *Id*. at 15. "Speculation or mere conjecture 'is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.'" *Id*., quoting *Skinner v Square D Co*, 445 Mich 153, 164;

516 NW2d 475 (1994). The "[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action." *West*, 469 Mich at 186.

We agree with the trial court that plaintiff failed to establish a prima facie case under either the WPA or the ELCRA because he did not demonstrate the existence of material questions of fact related to the element of causal connection between his protected activities and the contested employment action.

The trial court correctly dismissed plaintiff's WPA claim because there was no evidence presented that defendant had knowledge of plaintiff's protected activity under the WPA, specifically that he had filed a complaint with MIOSHA, at the time of the contested employment action. Plaintiff did not provide defendant with objective notice of the MIOSHA complaint, and the evidence of record establishes that defendant was first apprised of the MIOSHA complaint when MIOSHA officials appeared at the business, which was after plaintiff had been laid-off. Additionally, a reasonable inference cannot be made from the circumstantial evidence that the decision-makers related to plaintiff's employment had knowledge of the complaint at the time of the layoff.[2] Accordingly, plaintiff failed to establish a causal connection between his protected activity under the WPA and the layoff.

Similarly, although plaintiff provided evidence of defendant's knowledge of the MDCR filing at the time of the layoff, plaintiff failed to raise a genuine issue of material fact concerning whether there was a causal connection between plaintiff's MDCR complaint and his layoff. Temporal proximity alone cannot establish a causal connection, and plaintiff failed to present other evidence of causation. *Id*. at 186. Five other employees were laid off from their positions as part of the reduction in force, plaintiff acknowledged he had the least amount of seniority in the warehouse department, and King — who also made a complaint to the MDCR — was retained. Viewed in the light most favorable to plaintiff, the evidence did not support a conclusion that the MDCR complaint was a motivating factor in the layoff nor could a reasonable inference of causation be drawn it.

We hold that the trial court properly granted summary disposition because of plaintiff's failure to establish prima facie cases of retaliation under the WPA and the ELCRA. Because of our decision related to the prima facie cases, we need not address whether genuine issues of material fact existed as to pretext.

Affirmed.

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[2] That is, evidence that two non-managerial, non-decision-making employees asked plaintiff if he had filed a complaint does not create a reasonable inference that any managerial level, decision-making employee knew defendant had filed a complaint with MIOSHA.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly